

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35461

WILLIAM ELLIS,)	2009 Unpublished Opinion No. 608
)	
Petitioner-Appellant,)	Filed: September 16, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. Randy J. Stoker, District Judge.

Order summarily dismissing application for post-conviction relief, affirmed.

Nevin, Benjamin, McKay & Bartlett; Dennis A. Benjamin, Boise, for appellant. Dennis A. Benjamin argued.

Hon. Lawrence G. Wasden, Attorney General; Rebekah A. Cudé, Deputy Attorney General, Boise, for respondent. Rebekah A. Cudé argued.

GUTIERREZ, Judge

William Ellis appeals from the summary dismissal of his application for post-conviction relief. We affirm.

I.

BACKGROUND

Pursuant to a plea agreement, Ellis entered a guilty plea to one count of lewd conduct with a minor under the age of sixteen in exchange for the state's dismissal of a second count of lewd conduct and an agreement not to file any other charges against Ellis for the known abuse of other victims. Ellis further agreed to pay restitution and obtain a psychosexual evaluation prior to sentencing. The state's sentencing recommendation remained open until after the psychosexual evaluation was complete. Ellis completed a felony guilty plea questionnaire acknowledging that his attorney had explained his constitutional rights and the consequences of his guilty plea. After reviewing the presentence investigation report and the psychosexual

evaluation, the district court sentenced Ellis to a term of fifteen years determinate. This Court affirmed Ellis' sentence and the denial of his Idaho Criminal Rule 35 motion on direct appeal. *State v. Ellis*, Docket No. 33633 (June 14, 2007) (unpublished).

Ellis filed a petition for post-conviction relief, alleging claims of ineffective assistance of counsel and claims of due process violations. The state moved for summary dismissal of all claims, and the district court filed a notice of intent to dismiss based on the state's reasons. Following Ellis' response with supplemental briefing, the district court granted the state's motion for summary dismissal and this appeal followed. Of the claims raised in Ellis' petition, he challenges only the summary dismissal of his claim that counsel was ineffective by failing to advise him of his constitutional rights relating to the psychosexual evaluation.

II.

STANDARD OF REVIEW

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). As with a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under Idaho Rule of Civil Procedure 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary disposition of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact which, if resolved in the

applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray*, 121 Idaho at 924-25, 828 P.2d at 1329-30. To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient, and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of material fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). For purposes of considering a summary dismissal motion, an applicant's uncontroverted factual allegations contained in an application for post-conviction relief and supporting affidavits are assumed to be true. *Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008). However, because the trial court rather than a jury will be the trier of fact in the event of an evidentiary hearing, summary disposition is permissible, despite the possibility of conflicting inferences to be drawn from the facts, for the court alone will be responsible for resolving the conflict between those inferences. *State v. Yakovac*, 145 Idaho 437, 180 P.3d 476 (2008); *Hayes*, 146 Idaho at 355, 195 P.3d at 714. That is, the judge in a post-conviction action is not constrained to draw inferences in favor of the party opposing the

motion for summary disposition but rather is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Id.*

III. DISCUSSION

Ellis contends that the district court erred by dismissing his post-conviction petition without an evidentiary hearing. Specifically, he claims there are genuine issues of material fact as to whether his attorney was ineffective for failing to advise him of his right to remain silent during the psychosexual evaluation and the consequences of waiving that right.

Ellis contends that the attorney never explained his Fifth Amendment rights as they related to a psychosexual evaluation, in direct violation of *Estrada v. State*, 143 Idaho 558, 562-63, 149 P.3d 833, 837-38 (2006). In *Estrada*, the Idaho Supreme Court declared that a defendant has the Sixth Amendment right to counsel in deciding whether to submit to a psychosexual evaluation. *Id.* at 562-63, 149 P.3d at 837-38. The Sixth Amendment right to counsel is the right to effective assistance of counsel. *Id.* at 562, 149 P.3d at 837; *State v. Doe*, 136 Idaho 427, 433, 34 P.3d 1110, 1116 (Ct. App. 2001); *Beasley v. State*, 126 Idaho 356, 360, 883 P.2d 714, 718 (Ct. App. 1994). The Court also concluded that a defendant's Fifth Amendment right against self-incrimination applies during a psychosexual evaluation. *Estrada*, 143 Idaho at 563, 149 P.3d at 838. Therefore, an attorney's failure to discuss the right to remain silent and the consequences of waiving that right with a client could be deficient performance. Assuming, as we must, that Ellis' assertion is true, and his attorney did not advise him about his Fifth Amendment rights prior to submitting to the psychosexual evaluation, we must determine whether Ellis was prejudiced by this deficiency.

The waiver of a fundamental right is generally considered valid when it is given knowingly, voluntarily and intelligently. Our case law has focused on the waivers involved with guilty pleas and *Miranda*¹ warnings. In either circumstance, a waiver is voluntary, knowing and intelligent when it is given without coercion, with knowledge of the right or rights involved and with full awareness of the consequences of relinquishing those rights. *See State v. Colyer*, 98 Idaho 32, 34, 557 P.2d 626, 628 (1976); *State v. Nguyen*, 122 Idaho 151, 153-54, 832 P.2d 324, 326-27 (Ct. App. 1992). A valid waiver will not be presumed from a silent record, *Colyer*, 98

¹ *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Idaho at 33-34, 557 P.2d at 627-28, but must be demonstrated by all the relevant circumstances contained in the record. *State v. Carrasco*, 117 Idaho 295, 298, 787 P.2d 281, 284 (1990); *State v. Mitchell*, 104 Idaho 493, 498, 660 P.2d 1336, 1341 (1983); *State v. Dunlap*, 123 Idaho 396, 398, 848 P.2d 454, 456 (Ct. App. 1993). On appeal, the reviewing court can make reasonable inferences from the record. *State v. Sabin*, 120 Idaho 780, 781, 820 P.2d 375, 376 (Ct. App. 1991); *see also Colyer*, 98 Idaho at 34, 557 P.2d at 628.

Ellis asserts that the waiver was neither knowing nor intelligent because his defense attorney did not inform him that he did not have to participate in the psychosexual evaluation, or that anything he said during the evaluation would be considered by the court at sentencing. While *Estrada*, 143 Idaho at 562-63, 149 P.3d at 837-38, guarantees a defendant the right to counsel regarding the decision of whether to submit to a psychosexual evaluation, it does not require that *only* counsel can advise the defendant of his Fifth Amendment right and the consequences of waiving that right.

Prior to entering his guilty plea, Ellis signed the plea agreement offer and filled out a felony guilty plea questionnaire. The plea agreement specified that Ellis was to obtain a psychosexual evaluation prior to sentencing, and that the state's sentencing recommendation would remain open until the state received the psychosexual evaluation. By signing his name, Ellis indicated that he read and understood the plea agreement offer, and accepted all of the terms of the offer. The felony guilty plea questionnaire enumerated the rights Ellis gave up by pleading guilty, among which was the right to remain silent and not "make any statement to the Court or any person (including any law enforcement officer, policeman or other official) that will incriminate you, or in any way help to prove the charged crime(s) against you." Although this is specific to the guilty plea and does not mention the psychosexual evaluation or other instances where the right to remain silent may arise, it does explain what the right to remain silent means. At the change of plea hearing, the district court verified that Ellis had reviewed the felony guilty plea questionnaire with his attorney, understood its contents, and had answered all questions truthfully. The court then focused on the terms of the plea agreement.

The Court: The state's recommendation is to remain open until you receive a psychosexual evaluation. Do you agree to obtain such an evaluation?

Ellis: Yes, sir.

The Court: And do you agree to waive your right to remain silent in order to assist in the process of obtaining that evaluation?

Ellis: Yes, sir.

The court's question used the same language as the felony guilty plea questionnaire's explanation of constitutional rights. Since Ellis indicated that he understood the questionnaire's explanation of the right to remain silent, it can be reasonably inferred that he understood what right he was waiving by participating in the psychosexual evaluation. Immediately following this exchange, Ellis indicated that he had a question for his attorney and held a brief discussion off the record. This was one of three off-the-record discussions Ellis had with his defense attorney during the change of plea hearing.

Even if Ellis' attorney did not explain to him that he had the right to remain silent during the psychosexual evaluation, the record makes clear that Ellis knew he had that right, and what that right entailed, despite his claims to the contrary. Allegations in a post-conviction application are insufficient for the granting of relief when they are clearly disproved by the record of the original proceedings. *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); *Chouinard v. State*, 127 Idaho 836, 839, 907 P.2d 813, 816 (Ct. App. 1995). Ellis also claims that while he was aware that the state would have access to his psychosexual evaluation, at no point did he realize that the court would consider it prior to sentencing and use anything he said in fashioning the sentence. This argument is disingenuous at best. Ellis agreed that the state would not make a sentencing recommendation until after it received his evaluation. Ellis further acknowledged that he understood that only the district court could decide what sentence he would receive. The district court reasonably inferred that if Ellis knew the state would use the evaluation in fashioning a sentencing recommendation, then he must also have known that the court would use the evaluation as well.

Ellis failed to raise any genuine issues of material fact necessitating an evidentiary hearing. His claim that his Fifth Amendment waiver was not made voluntarily, knowingly and intelligently is disproved by the record. Therefore, he has failed to show prejudice resulting from his attorney's purported deficiency, and cannot support a claim of ineffective assistance of counsel.

IV. CONCLUSION

The district court did not err by granting the state's motion for summary dismissal of Ellis' application for post-conviction relief. Ellis failed to show that he suffered prejudice by

waiving his right to remain silent and participating in the psychosexual evaluation. The waiver was voluntary, knowing and intelligent. The district court's order is affirmed.

Chief Judge LANSING and Judge PERRY **CONCUR.**